Congress intended that the Commission develop a mechanism to respond to consumer complaints, the Commission has responded by creating an unnecessary administrative burden for the operator and an additional cost to be passed on to consumers.

D. The Uniform Rate Rules Should Not Apply to Individual Bulk Accounts.

Under Section 76.984(b), the Commission allows operators to establish rates for bulk accounts which are different from rates for individual residential accounts. However, "all multiple dwelling buildings in the franchise area must receive the same bulk discount rate structure." Order, at ¶ 424. Operators should be permitted to negotiate individual rate packages with MDUs and other commercial or bulk accounts. Cable operators must be able to maintain the flexibility to provide service pursuant to individually negotiated agreements in order to compete with other multichannel video providers.

Congress' concern as expressed in the legislative history of the 1992 Cable Act, was directed toward individual residential accounts and the effects of temporary discounts on emerging competitive services.[68/] The application of standardized pricing to bulk sales arrangements would have anticompetitive effects. Under the present regulations, unregulated MMDS and SMATV (and soon to be DBS) operators may target individual MDUs, offering discount rates while the cable operator's rates are, in effect, frozen in its bulk rate discount structure. With its rates undercut, a cable operator will be forced to retreat from existing

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68/ "This provision is . . . intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily." Senate Report at 76. See also Conference Report indicating that uniform pricing provision was designed to encourage competition by ... forbidding a cable system from offering prices within a franchise area in order to drive out competition where it exists only to later raise their rates when their competitor is driven out." 138 Cong. Rec. S14,248 (daily ed. Sep. 21, 1992).

bulk contract arrangements, one building at a time. Contrary to its assertions, the Commission is not relying here on marketplace considerations in developing its bulk account policies.[69] The MDU owner or manager has access to stand-alone SMATV and MMDS providers with low entry barriers. Absent the ability to compete and maintain existing bulk accounts as well as secure new ones, an operator's revenue base will suffer, which in turn will have upward pressure on system rates. This effect would be especially severe in communities with large numbers of bulk accounts where other multi-channel video providers may seek to underprice the cable operator and take advantage of his inability to adjust rates.

Although extending the uniform rate structure obligation to commercial accounts is unnecessary and unwarranted, if it is to remain part of the FCC's rules, clarification of those rules is critical in at least two respects. First, all existing arrangements should be grandfathered. It would make no sense to require renegotiations of hundreds of existing contracts in the community. Second, the Commission needs to clarify that operators may have subcategories to a rate structure based on the size or number of units at issue in the bulk sale arrangement and the duration of the agreement. Typical MDU arrangements, for example, may run for a three-year, six-year, or ten-year period; others may be of indefinite duration. In each case the rates charged reflect different elements of the agreement which make up the rate "structure."

E. A Franchising Authority Must be Required to Refund Franchising Fees in Excess of Five Percent Paid on the Original Rates When Ordering a Refund.

69/ Id., citing 1992 Cable Act § 2(b)(2).

Section 622 provides: "For any twelve-month period, the franchise fees paid by a cable operator shall not exceed 5 percent of such cable operators gross revenues derived in such period from the operation of the cable system." 47 U.S.C. § 542(b). A refund to customers of the cable operator's revenue from a given period will necessarily alter the calculation of a franchise fee based on gross revenue from that same period. The Commission's regulations should be modified to provide that any excess over 5 percent of the cable operator's adjusted revenue (minus refunds) paid to the franchising authority must be returned to the cable operator. While this should be apparent, the Commission's [illegible] legislative history of Section 612(c) specifically recognizes that the right to charge different rates to different programmers, is vital to an operator's ability to provide leased access capacity without adverse financial consequences.[70] The fact that leased programming may be somewhat similar to that already carried on the system does not obviate the potential for adverse financial consequences. To the contrary, a rule that prevents operators from weighing these risks and pricing channel capacity accordingly forces operators to lease channel capacity at a discount to certain programmers simply on the basis of the type of programming involved. This is entirely inconsistent with the operator's right to consider the mix of existing services as well as potential market fragmentation in the pricing of leased channels.

Establishing maximum rates for leased access based on three categories of programming is itself arbitrary. The Commission was charged with the responsibility of identifying the <u>maximum</u> rates that may be charged, leaving parties room to negotiate over actual terms. The Commission's categorization scheme intrudes into that process and imposes constraints far greater than those contemplated by Congress. Assuming, <u>arguendo</u>, that some differentiation is appropriate, the Commission should limit its classifications. The only two classifications that are reasonable are based on a non-content differentiation between programming carried on a per channel or per event basis and other programming. There is no legitimate rationale or support for separating home shopping programming from other

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<u>70</u>/ <u>See</u> 1984 House Report at 51. The Commission's categorization scheme completely <u>disregards the</u> "<u>marketing of the</u> mix of existing services as well as potential market

types of programming. Absent an explanation, the rate classification established by the Commission for leased channel capacity is arbitrary and capricious.[71]

B. The Commission's Rules Prevent Operators from Recovering the Costs of Providing Part-Time Channel Capacity.

The Order also appears to contemplate that programmers will lease channel capacity for different day parts, rather than for a full day. Order at ¶ 498, n.1283. The rules do not, however, provide a mechanism for the operator to recover the additional costs incurred when channel capacity is leased on less than a full-time basis. See, e.g., Comments of Cox at 40. Part-time leases impose additional administrative and technical costs, as well as the opportunity cost of losing capacity on a particular channel for the portion of the day that is not leased.[72] Despite comments raising these concerns, the rules fail to address how operators will be compensated for these costs or whether operators may charge different rates for different day parts.[73] Without such clarification, the rules prevent operators from

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71/ See State Farm, 463 U.S. at 43 (agency decision must provide "a rational connection between the facts found and the choice made.")

72/ Similar costs would be incurred if programmers were allowed to lease channel capacity on a periodic basis, e.g., only on certain days of the week or certain times of the year.

73/ If operators are not given the discretion to charge different rates for different day parts, then certain day parts, notably prime time, will be greatly underpriced while other day parts will be overpriced. In conjunction with the categorization scheme adopted by the Commission, this could result in a situation where some programmers will be paying less for prime time than other programmers pay for the same amount of time in a less desirable day part. This is inconsistent with congressional intent.

recovering the costs of providing leased channel capacity and making a reasonable profit on these channels. Operators should only be required to lease complete channels.[74]

C. Cable Operators Should Not be Required to Provide Billing and Collection Services for Leased Access Users.

The Commission was empowered to establish reasonable terms and conditions for commercial use of leased access channels, including those for billing and collection. 47 U.S.C. § 532(c)(4)(A)(ii). However, the 1992 Cable Act does not suggest that the

IX. Conclusion.

For all the foregoing reasons, the Commission should reconsider the Order as described herein.

Respectfully submitted,

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June 21, 1993

APPENDIX A

Booth American Company
Cablevision Industries Corporation
Cox Cable Communications, a division of Cox Communications, Inc.
First Carolina Communications, Inc.
Jones Intercable, Inc.
Marcus Cable Company, L.P.
Mid-Coast Cable Television, Inc.
Service Electric Cablevision, Inc.
Sonic Communications
Southwest Missouri Cable TV, Inc.
Summit Communications Group, Inc.
US Cable Corporation
Vista Communications, Inc.

APPENDIX B

Effect of Excluding External Costs from Initial Inflation Calculation

This appendix describes the effects of preventing cable operators from recovering external costs incurred between September 30, 1992 and initial date of regulation. It shows the effect of excluding these costs and revenues for the first year after regulation begins. This revenue loss will continue each year until the cable operator is no longer subject to rate regulation.

The calculations are based on a system with 40 total channels, 25 satellite channels and 10,000 subscribers, with no changes in any of these parameters after September 30, 1992. The following assumptions are made: (1) There is no effect from equipment costs or franchise fee adjustments; (2) The operator increased rates by five percent on January 1, 1993 and has had no other increases since then; (3) Inflation is four percent; and (4) External costs are $80,000 per month on September 30, 1992 and increase 10 percent between then and October 1, 1993, the initial date of regulation. If this system charged $0.60 per channel last September and increased rates five percent, to $0.63 per channel, on January 1, 1993, the system's benchmark rate would be $0.549 per channel (assuming four percent inflation).

1. Rate Calculation

Rate on September 30, 1992	$0.60 per channel
Rate on October 1, 1993	$0.63 per channel
Benchmark Rate	$0.549 per channel
Permitted Rate	$0.549 per channel
Permitted Rate plus Inflation Adjustment	$0.54 * 1.04 = $0.571 per channel

2. Revenues per Month

On September 30, 1992	$0.60 * 40 * 10,000 = $240,000
On October 1, 1993	$0.63 * 40 * 10,000 = $252,000
After Rate Regulation	$0.571 * 40 * 10,000 = $220,400

3. External Costs per Month

September 30, 1992 Costs	$80,000
October 1, 1993 Costs	$80,000 * 1.10 = $88,000

4. Effect If External Costs Are Included in Inflation Adjustment

External costs are equal to one third of revenue, and should be weighted as such in the inflation adjustment. (This actually understates the effect, since external costs will be a greater proportion of total costs than of total revenues).

Adjusted Inflation Rate	(10% * 1/3) + (4% * 2/3) = 18/3% = 6 percent
Benchmark Adjusted for Inflation and External Costs	$0.549 per channel + 1.06 = $0.582 per channel
Revenue per Month with Adjustment	$0.582 * 40 * 10,000 = $232,776
Revenue Lost During First Year if External Cost Increases are Excluded.	($232,776 - $228,400) * 12 = $52,512

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